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## Note

### Partial-Birth Infanticide: An Alternate Legal and Medical Route to Banning Partial-Birth Procedures

Jill R. Radloff\*

Since the Supreme Court's decision in *Roe v. Wade*,<sup>1</sup> the American political and legal scene has been sharply divided over the legality of abortions.<sup>2</sup> The debate has become even more graphic and disturbing in the last few years as Congress and many state legislatures have proposed and often passed partial-birth abortion ban statutes.<sup>3</sup> These statutes seek to ban

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1. 410 U.S. 113, 153 (1973) (holding that the right to privacy includes a woman's decision to have an abortion).

2. See, e.g., *Planned Parenthood v. Casey*, 505 U.S. 833, 869 (1992) (plurality opinion) (acknowledging that the issue of legalizing abortion continues to be at least as divisive as it was in 1973 when *Roe v. Wade* was handed down); ABORTION, MORAL AND LEGAL PERSPECTIVES 9 (Jay L. Garfield & Patricia Hennessey eds., 1984) (characterizing the legal status of abortion as one of the most divisive social issues facing the American public).

3. The United States Congress first passed a partial-birth abortion ban statute in 1995. See *Partial-Birth Abortion Ban Act of 1995*, H.R. 1833, 104th Cong. (1995). President Clinton vetoed the Act on April 10, 1996 because it lacked an exception for women who faced serious health consequences. See Ann Devroy, *Late-Term Abortion Ban Vetoed; 'Small but Vulnerable' Group of Women Needs Procedure, Clinton Says*, WASH. POST, Apr. 11, 1996, at A1. The House overrode President Clinton's veto, but the Senate lacked nine votes of the two-thirds majority required to override the veto. See CONG. REC. H10642, roll call #422 (votes: 285-137) (daily ed. Sept. 19, 1996); CONG. REC. S11337-61, roll call #301 (votes: 57-41) (daily ed. Sept. 26, 1996); Helen Dewar, *Senate Sustains Clinton Veto of Late-Term Abortion Ban*, WASH. POST, Sept. 27, 1996, at A4. A similar act was introduced in 1997. See *Partial-Birth Abortion Ban Act of 1997*, H.R. 1122, 105th Cong. (1997). This time the Senate fell only three votes short of overriding President Clinton's veto. See CONG. REC. S10551-64, roll call #277 (votes: 64-36) (daily ed. Sept. 18, 1998); *Senate Override Fails on Abortion Measure; Effort to Block Clinton Veto Falls*, 64-36, WASH. POST, Sept. 19, 1998, at A8.

In addition, state legislatures vigorously have been enacting partial-birth

a particular abortion procedure in which a hole is made in the skull of the fetus and the brains are extracted so that the fetus's head can be compressed, permitting the fetus to be removed intact.<sup>4</sup> Given the graphic nature of the procedure, it is not surprising that many have compared it to a form of infanticide.<sup>5</sup> Yet, despite what appears to be a thin line between partial-birth abortions and infanticide, where partial-birth abortion bans have been challenged in court, the analysis has focused solely on whether the bans can be upheld under the Supreme Court's abortion jurisprudence.<sup>6</sup>

In November of 1998, voters in Washington State were presented with Ballot Initiative 694.<sup>7</sup> Although Initiative 694

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abortion ban statutes. Currently, 28 states have enacted partial-birth abortion ban statutes. See *infra* notes 37-38 (listing the state statutes). In fact, only four state legislatures (Nevada, North Dakota, Texas and Pennsylvania) have not introduced any partial-birth abortion ban statute in the last three years. See James Bopp, Jr. & Curtis R. Cook, *Partial-Birth Abortion: The Final Frontier of Abortion Jurisprudence*, 14 ISSUES L. & MED., Summer 1998, at 3, 4 n.2 (listing the states that have passed and proposed partial-birth abortion bans). Texas, however, has a long-standing statute that criminalizes the killing of "a child in a state of being born and before actual birth." See TEX. REV. CIV. STAT. ANN. art. 4512.5 (West 1976) ("Whoever shall during parturition of the mother destroy the vitality or life in a child in a state of being born and before actual birth, which child would otherwise have been born alive, shall be confined in the penitentiary for life or for not less than five years."); *Roe v. Wade*, 410 U.S. at 117 n.1 (noting that although Article 4512.5 was part of the Texas chapter challenged as unconstitutional, this specific article was not under attack).

4. See *The Partial-Birth Abortion Ban Act of 1995: Hearings on H.R. 1833 Before the Senate Comm. on the Judiciary*, 104th Cong. 5-12 (1995) [hereinafter *Senate Hearings*] (publishing Dr. Martin Haskell's 1992 presentation at a National Abortion Federation seminar that first introduced the procedure); see also *infra* notes 20-29 and accompanying text (describing partial-birth abortion procedures in more detail).

5. See *House Overrides Veto by Clinton of a Ban on Late Abortions*, WALL ST. J., Sept. 20, 1996, at A1 (recognizing that even some abortion rights supporters find partial-birth abortions uncomfortably close to infanticide); see also Nat Hentoff, 'Close to Infanticide', WASH. POST, Aug. 30, 1996, at A31 (recognizing that in most cases the fetus is still alive when scissors are inserted into the base of its skull and the brains are sucked out).

6. See *infra* Part I.C (describing decisions by lower courts on the constitutionality of partial-birth abortion ban statutes).

7. Initiative Measure No. 694—Partial-Birth Abortions, WASH. REV. CODE ANN. tit. 9, ch. 9.02 (West Supp. 1998) [hereinafter Initiative 694]. Initiative 694 was rejected at the polls. See Hunter George, *Medicinal Marijuana Measure Approved; Abortion Rejected*, COLUMBIAN, Nov. 4, 1998, at B2 (describing the rejection of Initiative 694 by a measure of 57% to 43%). It is not surprising that Washington voters refused to adopt Initiative 694—ballot measures upholding abortion rights previously had been passed three times, and "Washington state voters have long been pro-choice." See Lynne K.

shared the same objective as partial-birth abortion bans in other states, Initiative 694 was the first state proposal that sought to ban partial-birth procedures as a form of infanticide.<sup>8</sup> Specifically, the Initiative defined the process of birth and banned the killing of an infant in the process of birth as infanticide.<sup>9</sup> By concluding that during a partial-birth procedure the child dies during the birth process and not within the uterus, Initiative 694 claimed that it was not regulating abortion but instead proscribing infanticide.<sup>10</sup> Although Washington voters rejected the Initiative, its unique approach could serve as a model for other state legislatures and possibly for Congress as they draft new partial-birth procedure bans.<sup>11</sup> Moreover, the definitional approach of the birth process taken by Initiative 694 represents a potentially huge turning point in abortion jurisprudence.<sup>12</sup>

This Note examines whether the infanticide distinction drawn by partial-birth infanticide bans like Initiative 694 is medically accurate and whether partial-birth infanticide can be constitutionally banned. Part I describes partial-birth procedures, discusses the Supreme Court's historical abortion jurisprudence and recent court decisions on the constitutionality of partial-birth abortion bans, and details the unique characteristics of Initiative 694. Part II explores the medical definitions of the birth process and whether a distinction can be made between abortion and infanticide. Part III argues that bans similar to Initiative 694 would be constitutional because they would ban partial-birth infanticide, not abortion, and highlights the benefits of the infanticide approach versus the abortion approach of partial-birth procedure bans. Finally, this Note concludes that partial-birth infanticide bans like Initiative 694 are not only constitutional, but should also serve as a model for states whose partial-birth abortion ban statutes have been enjoined and for those states who are just enacting partial-birth procedure bans.

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Varner, *Ban on Late-Term Abortions Defeated*, SEATTLE TIMES, Nov. 4, 1998, at B2.

8. Compare *infra* notes 37-39 (describing other states' partial-birth abortion bans), with *infra* notes 74-81 (describing Initiative 694).

9. See Initiative 694 §§ 1-2.

10. See *id.* §§ 1(8), 2(3).

11. See *infra* Part III.B (discussing the benefits of a partial-birth infanticide statute in comparison to a partial-birth abortion statute).

12. See *infra* notes 165-171 and accompanying text.

## I. THE ABORTION ROADBLOCK

## A. DEFINING A PARTIAL-BIRTH PROCEDURE

Partial-birth abortion is not a medical term, but a description that developed in conjunction with the legislative efforts to ban a particular abortion method.<sup>13</sup> The medical community recognizes six abortion procedures: suction curettage,<sup>14</sup> dilation and evacuation (D & E),<sup>15</sup> dilation and extraction (D & X),<sup>16</sup> in-

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13. See *Planned Parenthood v. Woods*, 982 F. Supp. 1369, 1376 (D. Ariz. 1997) (noting that "partial-birth abortion" is not a medical term recognized in obstetrics or gynecology); *Evans v. Kelley*, 977 F. Supp. 1283, 1297 (E.D. Mich. 1997) (stating that all doctors testifying at the court hearing agreed that "partial-birth abortion" is not a medical term); Ann MacLean Massie, *So-Called "Partial-Birth Abortion" Bans: Bad Medicine? Maybe. Bad Law? Definitely!*, 59 U. PITT. L. REV. 301, 313 (1998) (stating that the term "partial-birth abortion" does not exist in medical terminology or literature). But see *Richmond Med. Ctr. for Women v. Gilmore*, 144 F.3d 326, 327 (4th Cir. 1998) (finding that both the American Medical Association (AMA) and the American College of Obstetricians and Gynecologists (ACOG) recognize the term "partial-birth abortion").

14. The most common first trimester abortion procedure is suction curettage, also known as suction aspiration. See *Carhart v. Stenberg*, 11 F. Supp. 2d 1099, 1102 (D. Neb. 1998) (referring to an AMA report stating that suction curettage is the most common abortion procedure from the sixth to twelfth week of gestation, but is often utilized up to the fifteenth week). This procedure entails dilation of the cervix so that a suction tube can be inserted into the uterus and the fetus removed with suction. See *Planned Parenthood v. Doyle*, 9 F. Supp. 2d 1033, 1036 (W.D. Wis. 1998), *rev'd*, 162 F.3d 463 (7th Cir. 1998); *Evans*, 977 F. Supp. at 1292.

15. See *Women's Med. Profl Corp. v. Voinovich*, 130 F.3d 187, 198 (6th Cir. 1997), *cert. denied*, 118 S. Ct. 1347 (1998) (describing a conventional D & E procedure); *Evans*, 977 F. Supp. at 1293 (describing the steps taken to perform a D & E abortion). The first step of a D & E abortion is overnight dilation of the cervix using laminaria, which are osmotic dilators that absorb natural moisture and expand to dilate the cervix. See *Planned Parenthood v. Miller*, 30 F. Supp. 2d 1157, 1161 (S.D. Iowa 1998). The following day the physician removes the laminaria and begins to evacuate the uterus by a combination of vacuum suction cannulas, suction curettes, or forceps. See *Doyle*, 9 F. Supp. 2d at 1036. The physician then intentionally dismembers the fetus in order to remove it more easily from the uterus. See *Voinovich*, 130 F.3d at 198; *Carhart*, 11 F. Supp. 2d at 1103-04 (recognizing that at this stage of development the fetus is larger and the bones are more rigid, making dismemberment necessary for the fetus to be safely removed). For a medical textbook description of abortion procedures, see generally WARREN M. HERN, *ABORTION PRACTICE* 108-56 (1984). D & E abortions are the most common method of second trimester abortions. See *Carhart*, 11 F. Supp. 2d at 1103 (citing an AMA report showing that D & E abortions are the most common procedure for abortions performed between 13 and 15 weeks of gestation); *Evans*, 977 F. Supp. at 1293 (noting that "the D & E procedure is the preferred method for second trimester abortions"). D & E abortions normally are performed after

duction,<sup>17</sup> hysterotomy,<sup>18</sup> and hysterectomy.<sup>19</sup> The procedure most commonly equated with partial-birth abortion is the D & X procedure,<sup>20</sup> which is also known as the intact dilation and evacuation (intact D & E).<sup>21</sup> A D & X procedure is a variation of the D & E procedure.<sup>22</sup> The D & X procedure differs

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13 weeks, but not frequently after 20 weeks. *See id.*

16. *See infra* notes 20-26 (describing the D & X procedure); *see also infra* notes 114-122 and accompanying text (analyzing why a D & X procedure is not characterized properly as an abortion procedure).

17. In an induction procedure, a hypertonic solution of saline, urea, or prostaglandin is infused into the amniotic cavity. *See Carhart v. Stenberg*, 972 F. Supp. 507, 516-17 (D. Neb. 1997); HERN, *supra* note 15, at 125-26. This solution "causes fetal demise and induces uterine contractions." *Carhart*, 972 F. Supp. at 517. Induction abortions are performed only in the second or third trimester. *See Evans*, 977 F. Supp. at 1293-95 (stating that an induction abortion cannot be accomplished successfully at 13 to 16 weeks of gestation).

18. A hysterotomy is essentially a pre-term Cesarean section. *See Doyle*, 9 F. Supp. 2d at 1037.

19. A hysterectomy entails the surgical removal of the woman's uterus. *See Hope Clinic v. Ryan*, 995 F. Supp. 847, 853 (N.D. Ill. 1998).

20. *See, e.g., Richmond Med. Ctr. for Women v. Gilmore*, 144 F.3d 326, 327 (4th Cir. 1998) (stating that partial-birth abortion is otherwise known as an intact D & X in the medical community); *Eubanks v. Stengel*, 28 F. Supp. 2d 1024, 1028 (W.D. Ky. 1998) (stating that a partial-birth abortion procedure is known in medical circles as a D & X procedure). Dr. Martin Haskell was the first to coin this title for the procedure. *See supra* note 4 (noting that Dr. Haskell developed the procedure).

21. *See, e.g., Eubanks*, 28 F. Supp. 2d at 1028 (noting that D & X and intact D & E are alternate terms for the same procedure); *Planned Parenthood v. Doyle*, 9 F. Supp. 2d 1033, 1036 (W.D. Wis. 1998) (noting that the intact D & E is synonymous with D & X or intact D & X), *rev'd*, 162 F.3d 463 (7th Cir. 1998). Dr. James McMahon, who specialized in late-term abortions, used the term intact D & E to describe the procedure that he performed. *See Roy Rivenburg, Partial Truths in the PR War over a Form of Late-Term Abortions, Both Sides Are Guilty of Manipulating the Facts. Here's What They Are (and Aren't) Saying*, L.A. TIMES, Apr. 2, 1997, at E1. Haskell's and McMahon's procedures are virtually identical, making the terms equivalent.

22. *See Carhart v. Stenberg*, 11 F. Supp. 2d 1099, 1105 (D. Neb. 1998) (describing a D & X procedure as a form of D & E abortion); *Doyle*, 9 F. Supp. 2d at 1036 (noting that the D & X is a variant of the conventional D & E); *Richmond Med. Ctr. for Women v. Gilmore*, 11 F. Supp. 2d 795, 803 (E.D. Va. 1998) ("As a general proposition, D & X is a variant of D & E but 'differs from classic D & E in that it [D & X] does not rely upon dismemberment to remove the fetus.'"). The D & X procedure is assumed to be utilized most commonly in late second trimester abortions after twenty weeks. *See Carhart*, 11 F. Supp. 2d at 1105-06 (recognizing that only at approximately 20 weeks gestation is the fetus developed enough to be removed intact, but that at this stage the head is too large to be removed without either crushing or compressing it); *Senate Hearings, supra* note 4, at 6 (reprinting Dr. Haskell's presentation in which he stated that he "routinely performs this procedure on all patients 20 through 24 weeks"). Even though the D & X procedure may be the most common late-

from the D & E method because the physician attempts to remove the fetus from the uterus in an intact state, rather than dismembering and removing parts of the fetus.<sup>23</sup> To remove an intact fetus from the uterus in a D & X procedure, the doctor uses instruments to grasp onto a lower extremity of the fetus and pull the lower extremities and torso into the vagina.<sup>24</sup> The doctor proceeds to poke a pair of blunt scissors into the base of the skull and spread them open so that a suction catheter may be inserted and the skull contents removed because in most cases the fetal skull is too large to be delivered.<sup>25</sup> Once the skull contents are extracted and the skull compressed, the child is delivered completely out of the uterus and the vagina.<sup>26</sup>

Although the above process describes the steps normally taken to perform a D & X procedure, doctors throughout the

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term abortion procedure, there still is much dispute over the actual number of D & X procedures performed in the United States. See Massie, *supra* note 13, at 318-19 (recognizing that the initial statistic of only several hundred D & X procedures performed yearly is likely inaccurate, but that even the more accurate estimate of several thousand D & X procedures is small in comparison to the 1.5 million abortions performed annually); Bopp & Cook, *supra* note 3, at 13 (stating that the head of the National Coalition of Abortion Providers now estimates that between 3000 and 5000 partial-birth abortions are performed annually).

23. See *Voinovich*, 130 F.3d at 199 (noting that the primary distinguishing characteristic of a D & X procedure is that it "results in a relatively intact fetus"); *Doyle*, 9 F. Supp. 2d at 1036 (same); cf. *supra* note 15. In addition, the D & X procedure differs from the D & E procedure because there is often an additional day of dilation of the cervix prior to the procedure. See *Voinovich*, 130 F.3d at 198-99. The additional day of dilation is needed because the D & X procedure normally is done only in late second trimester abortions when the fetus is larger and more developed. See *id.*

24. See *Voinovich*, 130 F.3d at 199 (describing how a physician uses ultrasound guidance to grasp a lower extremity and pull the other lower extremities, torso, shoulders, and arms into the vagina); *Carhart*, 11 F. Supp. 2d at 1106 (stating that the fetus is pulled into the vaginal cavity except for the head, which remains "lodged in the uterine side of the cervical canal").

25. See *Voinovich*, 130 F.3d at 199 (describing use of scissors and a suction cannula to decompress the fetal head); *Carhart*, 11 F. Supp. 2d at 1106 (describing use of an instrument to either perforate or tear the skull in order for a cannula to be inserted and cranial contents removed); *Hope Clinic v. Ryan*, 995 F. Supp. 847, 852 (N.D. Ill. 1998) (stating that in late second-trimester abortions the head is too large to pass through the cervix and either must be decompressed or evacuated); *Evans*, 977 F. Supp. at 1293 (describing methods for reducing the size of the head by either collapsing it or evacuating its contents).

26. See *Ryan*, 995 F. Supp. at 852 (describing the breech delivery of an intact fetus after the decompression of the fetal skull); *Evans*, 977 F. Supp. at 1293 (describing removal of an intact fetus after evacuation of the cranium).

country have developed their own variations to the procedure.<sup>27</sup> Therefore, a statute defining the D & X procedure step-by-step and banning the procedure directly could easily be circumvented.<sup>28</sup> Thus, in order to encompass all of the variations and prevent circumvention of the ban, most legislatures have relied on a general description of the process and the general term partial-birth procedure rather than a direct ban of the D & X procedure.<sup>29</sup>

## B. PROCEDURAL BANS IN SUPREME COURT ABORTION JURISPRUDENCE

In 1973, the Supreme Court held in *Roe v. Wade* that a woman had a constitutional right to end her pregnancy with an abortion during the first trimester and that during the second trimester the state could only regulate abortions in ways reasonably related to a woman's health.<sup>30</sup> The Supreme Court abandoned the original trimester framework in 1992 with its plurality opinion in *Planned Parenthood v. Casey*.<sup>31</sup> *Casey* es-

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27. See *Carhart*, 11 F. Supp. 2d at 1105-06 (noting that the physician-plaintiff in the case did not adhere to the ACOG-defined D & X procedures because he did not manipulate the fetus to breech position).

28. See Bopp & Cook, *supra* note 3, at 23-25 (detailing how the ACOG description of the D & X method would not encompass commonly used variations in the procedure). Specifically, if a statute banned the D & X procedure as defined by the ACOG and the doctor completely evacuated the intracranial contents, the statute would not be violated because the ACOG definition calls for partial rather than complete evacuation of intracranial contents. See *id.* at 23. The ACOG definition is also defective in stating that the evacuation of intracranial contents is performed on a "living fetus" because in most cases the fetus is no longer living once the scissors are thrust into the base of the skull; the brain contents are evacuated from a *dead* fetus. See *id.* at 24. In addition, a doctor could circumvent a partial-birth abortion ban patterned after the ACOG definition by not turning the fetus into the breech position or by cutting off a limb of the fetus so that the fetus no longer would be wholly "intact." See *id.* at 24-25.

29. See *infra* note 38 and accompanying text; see also *Richmond Med. Ctr. for Women v. Gilmore*, 11 F. Supp. 2d 795, 814 (E.D. Va. 1998) (noting that the state argued that if the ban had defined the procedure with reference to the descriptions of the D & X method provided by the AMA and ACOG, "the providers of abortion would have made fine adjustments to their conduct so as to avoid falling within the statutory proscription"); *Planned Parenthood v. Doyle*, 9 F. Supp. 2d 1033, 1042 (W.D. Wis. 1998) (finding that the rejected amendment to the Wisconsin statute, which would have listed a seven-step definition of a partial-birth procedure, likely was rejected because it "could have been easily avoided with non-traditional means of killing"), *rev'd*, 162 F.3d 463 (7th Cir. 1998).

30. 410 U.S. 113, 164 (1973)

31. 505 U.S. 833, 870-72 (1992) (plurality opinion) (rejecting the trimester



established the undue burden test as the method for determining whether a state law restricting pre-viability abortions is constitutional<sup>32</sup> and reaffirmed the state's power to restrict post-viability abortions if the law contained exceptions for pregnancies that endangered the woman's life or health.<sup>33</sup>

In its twenty-six year history of abortion jurisprudence, the Supreme Court only once has considered the constitutionality of banning a specific abortion procedure. In *Planned Parenthood v. Danforth*,<sup>34</sup> the Supreme Court found unconstitutional a Missouri law which prohibited the use of saline amniocentesis because it would have banned one of the most common and safest second trimester abortion procedures.<sup>35</sup>

### C. PARTIAL-BIRTH ABORTION BANS

State statutes, like the proposed federal statutes, have sought to ban partial-birth abortions by defining a partial-birth abortion in terms of the procedural steps a physician takes to perform the abortion.<sup>36</sup> Some states have specifically sought to

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framework of *Roe* and replacing it with a line drawn at viability so that before the fetus reaches viability the woman may choose to terminate her pregnancy).

32. See *id.* at 875-77 (finding that state regulations that impose an undue burden on a woman's ability to choose to abort a nonviable fetus are unconstitutional and determining that an undue burden exists when "a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus").

33. See *id.* at 879.

34. 428 U.S. 52 (1976).

35. See *id.* at 75-79. At the time Missouri's ban on saline amniocentesis abortions was enacted, the procedure was used in 70% of all abortions performed after the first trimester. See *id.* at 76. Saline amniocentesis also was safer than carrying the child to term or than the alternative abortion procedures of a hysterectomy or hysterotomy. See *id.* at 77. The Court found that although prostaglandin injection was safer than saline amniocentesis, it was still in its experimental stage and was not readily available in Missouri. See *id.* Thus, the Court concluded that because the ban on saline amniocentesis had the effect of forcing a woman to "terminate her pregnancy by methods more dangerous to her health than the method outlawed" the ban was not reasonably related to the protection of maternal health. See *id.* at 79. It should be noted that *Danforth* was decided prior to the formulation of *Casey*'s undue burden test, which places an increased emphasis on the state's interest in fetal life. See *Casey*, 505 U.S. at 877; *Danforth*, 428 U.S. at 76 (applying *Roe*'s second trimester test); see also Bopp & Cook, *supra* note 3, at 42 (arguing that a partial-birth abortion ban passes the stricter standards applied in *Danforth* and thus necessarily would be constitutional "[u]nder the less stringent standards of *Casey*").

36. See *infra* notes 37-38 and accompanying text.

ban the D & X and intact D & E procedures.<sup>37</sup> The majority of states enacting these bans,<sup>38</sup> however, have followed the approach taken by Congress, which would have banned all procedures "in which the person performing the abortion partially vaginally delivers a living fetus before killing the infant and completing the delivery."<sup>39</sup>

In 1995, Ohio was the first state to attempt to ban partial-birth abortions.<sup>40</sup> It sought to do so by specifically criminalizing performance of the D & X procedure.<sup>41</sup> Dr. Haskell and his

37. See KAN. STAT. ANN. § 65-6721 (Supp. 1998); OHIO REV. CODE ANN. § 2919.15 (Anderson Supp. 1998); UTAH CODE ANN. § 76-7-310.5 (Supp. 1998). Kansas's statute was challenged in Kansas state court, but the Kansas Supreme Court dismissed the suit because there had been no charges filed against the doctor challenging the law. See John A. Dvorak, *Abortion Doctor Loses One, Wins One*, KAN. CITY STAR, Oct. 1, 1998, at C1. The Sixth Circuit found Ohio's statute to be unconstitutional. See *Women's Med. Prof'l Corp. v. Voinovich*, 130 F.3d 187 (6th Cir. 1997), cert. denied, 118 S. Ct. 1347 (1998); *infra* notes 41-45 and accompanying text. The constitutionality of Utah's statute has not been challenged, but it likely would not fall to the arguments made by the Sixth Circuit because its ban does not include D & E procedures. See UTAH CODE ANN. § 76-7-310.5(1)(a).

38. Twenty-five states have passed partial-birth abortion ban laws that either mirror or heavily borrow from the proposed federal act. See ALA. CODE § 26-23-1 to -6 (Supp. 1998); ALASKA STAT. § 18.16.050 (Michie 1998); ARIZ. REV. STAT. ANN. § 13-3603.01 (West Supp. 1998); ARK. CODE ANN. §§ 5-61-201 to -204 (Michie 1997); FLA. STAT. ANN. §§ 390.011, .0111 (West 1998); GA. CODE ANN. § 16-12-144 (Supp. 1998); 1998 Idaho Sess. Laws ch. 34, HB 576, 54th Legis., 2nd Reg. Sess. (enacted); 720 ILL. COMP. STAT. ANN. 513/1, 5, 10, 15, 20, 99 (West Supp. 1998); IND. CODE ANN. §§ 16-34-2-1, 7 (Michie Supp. 1998); 1998 S. File 2073, 77th Gen. Assem., 2d Sess. (Iowa) (enacted); KY. REV. STAT. ANN. §§ 311.720, .990 (Michie 1998); LA. REV. STAT. ANN. §§ 14:32.9, 40:1299.35.16 (West Supp. 1998); MICH. COMP. LAWS ANN. §§ 333.17016, .17516 (West Supp. 1998); MISS. CODE ANN. §§ 41-41-71, 73 (Supp. 1998); MONT. CODE ANN. § 50-20-401 (1997); NEB. REV. STAT. ANN. §§ 28-326, 328 (Michie Supp. 1997); N.J. STAT. ANN. §§ 2A:65A-5 to -7 (West Supp. 1998); OKLA. STAT. ANN. tit. 21, § 684 (West Supp. 1999); R.I. GEN. LAWS § 23-4.12-1 to -6 (Supp. 1998); S.C. CODE ANN. § 44-41-85 (Law Co-op. Supp. 1998); S.D. CODIFIED LAWS §§ 34-23A-28 to -32 (Michie Supp. 1998); TENN. CODE ANN. § 39-15-209 (1997); VA. CODE ANN. § 18.2-74.2 (Michie Supp. 1998); W. VA. CODE § 33-42-3 (Supp. 1998); WIS. STAT. ANN. §§ 895.038, 940.16 (West Supp. 1998).

39. Partial-Birth Abortion Ban Act of 1997, H.R. 929, 105th Cong. (1997); Partial-Birth Abortion Ban Act of 1995, H.R. 1833, 104th Cong. (1995).

40. It is not surprising that Ohio was the first state to enact such legislation. Dr. Haskell, the originator of the D & X procedure, is from Ohio. See *supra* notes 4, 20 and accompanying text (describing Dr. Haskell's development of the D & X procedure).

41. See OHIO REV. CODE ANN. § 2919.15 (Anderson 1998). The statute defined dilation and extraction as "the termination of a human pregnancy by purposely inserting a suction device into the skull of a fetus to remove the

clinic challenged the act, and a district court in Ohio determined that the statute was unconstitutional.<sup>42</sup> Upon appeal, the Sixth Circuit affirmed, agreeing that the language of the Ohio act was vague and could be interpreted to include both the D & X procedure and the D & E procedure.<sup>43</sup> After determining that the Ohio statute included both procedures, the Sixth Circuit analyzed the constitutionality of the ban as applied to pre-viability abortions under *Casey's* undue burden test.<sup>44</sup> Relying upon the Supreme Court's decision in *Danforth*, the panel concluded that because the statute banned "the most commonly used second trimester procedure," it imposed an unconstitutional burden on a woman's right to choose to have an abortion.<sup>45</sup>

Unlike the Ohio statute, most state partial-birth abortion ban statutes are more general, banning all abortion procedures in which a living fetus is partially delivered and then killed before the delivery is complete.<sup>46</sup> In addition to the general ban,

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brain." § 2919.15(A). The statute also specifically exempted suction curettage abortion procedures. *See id.* The statute specified that a violation of the statute was a fourth degree felony. *See id.* § 2919.15(D).

42. *See Women's Med. Profl Corp. v. Voinovich*, 911 F. Supp. 1051 (S.D. Ohio 1995), *aff'd*, 130 F.3d 187 (6th Cir. 1997), *cert. denied*, 118 S. Ct. 1347 (1998). The district court listed three bases for its determination that the Ohio statute was unconstitutional. First, the act was unconstitutionally vague because it could be read to include D & E abortions. *See id.* at 1063-67. Second, because the D & X procedure is potentially safer than other abortion procedures, banning the procedure would be an undue burden on a woman's ability to choose to have an abortion. *See id.* at 1067-71. Third, the ban did not serve the State's purpose of preventing unnecessary cruelty to the human fetus. *See id.* at 1071-75.

43. *See Women's Med. Profl Corp. v. Voinovich*, 130 F.3d 187, 199 (6th Cir. 1997), *cert. denied*, 118 S. Ct. 1347 (1998). The court found Ohio's statute vague as to whether it included D & E abortions because it specifically exempted suction curettage abortions but not D & E abortions. *See supra* note 41. The Sixth Circuit, however, did not rely upon the district court's conclusion that the D & X procedure was safer than other procedures or that the ban did not serve the state's purpose of preventing unnecessary cruelty to the human fetus. *See Voinovich*, 130 F.3d at 198.

44. *See Voinovich*, 130 F.3d at 200-01 (finding that a ban of both the D & X procedure and D & E abortions is an undue burden on a woman seeking an abortion prior to viability of the fetus).

45. *See id.* at 201 (finding that the definition of the banned procedure included D & E abortions, which are the most common method of abortion in the second trimester); *see also supra* note 15. The court then failed to reach the question of the constitutionality of the ban as applied to post-viability abortions because it determined that that portion of the act could not be severed. *See Voinovich*, 130 F.3d at 202.

46. *See supra* note 39 and accompanying text (quoting the language of the

some states have adopted the scienter provision amendment proposed by the United States Senate in the passage of the 1997 Partial-Birth Abortion Ban Act.<sup>47</sup> The scienter provision defines vaginal delivery as "deliberately and intentionally deliver[ing] into the vagina a living fetus, or a substantial portion thereof, for the purpose of performing a procedure the physician knows will kill the fetus, and kills the fetus."<sup>48</sup>

Courts have enjoined enforcement of the bans that follow the proposed federal statute in the majority of states where they have been challenged.<sup>49</sup> These courts have found the lan-

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federal act that these general bans mirror). These bans differ from the Ohio statute in that they do not use the medical descriptions of the abortion procedures to ban specific procedures. The use of a broad layman's term is preferable in some respects to the medical descriptions because it is more likely to be interpreted to include slight variations in the procedures which do not follow the exact steps of the medically defined procedures. *See supra* notes 27-29 and accompanying text.

47. *See* H.R. 1122, 105th Cong. § 2(b)(3) (1997). *See, e.g.*, 1998 Idaho Sess. Laws ch. 34, H.B. 576, 54th Legis., 2nd Reg. Sess. (enacted); 1998 S. File 2073, 77th Gen. Assem., 2d Sess. (Iowa) (enacted); KY. REV. STAT. ANN. §§ 311.720, .990 (Michie 1998); NEB. REV. STAT. ANN. § 28-326, -328 (Michie Supp. 1998); N.J. STAT. ANN. §§ 2A:65A-5 to -7 (West Supp. 1998); OKLA. STAT. ANN. tit. 21, § 684 (West Supp. 1999); R.I. GEN. LAWS § 23-4.12-1 to -6 (Supp. 1997); TENN. CODE ANN. § 39-15-209 (1997); VA. CODE ANN. § 18.2-74.2 (Michie Supp. 1997); W. VA. CODE § 33-42-3 (Supp. 1998). Montana's statute varies the intent requirement only slightly by requiring that the partial-birth abortion procedure be performed "purposely, knowingly, or negligently." MONT. CODE ANN. § 50-20-401 (1997). The Wisconsin statute requires that the partial-birth abortion procedure be performed "with the intent to kill the child." WIS. STAT. § 940.16 (West Supp. 1998). Louisiana's intent provision is uniquely worded, banning any abortion procedure "whereby a living fetus or infant is partially delivered or removed from the female's uterus by vaginal means and with specific intent to kill or do great bodily harm is then killed prior to complete delivery or removal." LA. REV. STAT. §§ 14:32.9, 40:1299.35.16 (West Supp. 1998).

48. H.R. 1122, 105th Cong. § 2(b)(3) (1997); *see also* 143 CONG. REC. S4694-95 (daily ed. May 20, 1997) (statement of Sen. Santorum) (stating that the amendment "tighten[s] up the language" and adds a mens rea element satisfying the vagueness concerns voiced on the House and Senate floors).

49. Courts have enjoined enforcement of the statutes in 18 states. *See* Planned Parenthood v. Doyle, 162 F.3d 463, 471 (7th Cir. 1998) (enjoining Wisconsin's statute); Causeway Med. Suite v. Foster, No. Civ. 97-2211, 1999 WL 123389 (E.D. La. Mar. 4, 1999); Planned Parenthood v. Verniero, No. CIV. 97-6170 AET, 1998 WL 849763, at \*26 (D.N.J. Dec. 8, 1998); A Choice for Women v. Butterworth, No. 98-0774, 1998 U.S. Dist. LEXIS 18433 (S.D. Fla. Nov. 23, 1998); Planned Parenthood v. Miller, 30 F. Supp. 2d 1157, 1168 (S.D. Iowa 1998) (issuing a permanent injunction); Eubanks v. Stengel, 28 F. Supp. 2d 1024 (W.D. Ky. 1998); Carhart v. Stenberg, 11 F. Supp. 2d 1099 (D. Neb. 1998); Planned Parenthood v. Miller, 1 F. Supp. 2d 958 (S.D. Iowa 1998) (issuing preliminary injunction); Hope Clinic v. Ryan, 995 F. Supp. 847 (N.D. Ill.

guage of the statutes to be vague and inclusive of both the D & E and the D & X procedure.<sup>50</sup> Specifically, courts have found the phrase "delivering into the vagina . . . a substantial portion"<sup>51</sup> of a living fetus particularly vague because "a substantial portion" could be anything from a detached leg or arm to the entire lower extremities other than the head.<sup>52</sup> The courts have then concluded that because a D & E procedure may result in a portion of the fetus protruding into the vagina, the statutes have the effect of banning all D & E procedures as well as D & X procedures.<sup>53</sup> Courts ruling on state statutes not containing the "substantial portion" language similarly have found that the statutes likely encompass the D & E procedure be-

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1998); *Summit Med. Assocs. v. James*, 984 F. Supp. 1404 (M.D. Ala. 1998); *Planned Parenthood v. Woods*, 982 F. Supp. 1369 (D. Ariz. 1997); *Evans v. Kelley*, 977 F. Supp. 1283 (E.D. Mich. 1997); see also Bopp & Cook, *supra* note 3, at 5 n.3 (listing unreported cases striking down partial-birth abortion laws in Alaska, Arkansas, Georgia, Idaho, Montana, Rhode Island, and West Virginia).

50. See *Verniero*, 1998 WL 849763, at \*22 (concluding that the statute would "effectively ban[ ] suction curettage, D & E and induction abortions"); *Eubanks*, 28 F. Supp. 2d at 1039 (finding that a D & E procedure may satisfy the elements of Kentucky's statute); *Carhart*, 11 F. Supp. 2d at 1128 (finding that a fair reading of the statute is that it prohibits D & E abortions); *Miller*, 1 F. Supp. 2d at 961-62 (holding that because the Iowa legislature rejected amendments which would have limited the statute to the D & X procedure, the ban may be interpreted to include D & E abortions and suction curettage procedures); *Ryan*, 995 F. Supp. at 854 (concluding that because "delivery" is given such a broad interpretation in obstetrics the Illinois statute may include all abortion procedures except hysterotomy and hysterectomy); *Woods*, 982 F. Supp. at 1378 (finding that Arizona's statute may include both D & E abortions and induction abortions); *Evans*, 977 F. Supp. at 1311 (determining that the statute is "hopelessly ambiguous" and may easily be interpreted to ban D & E abortions).

51. H.R. 1122, 105th Cong. §2(b)(3) (1997); see also *supra* notes 47-48 and accompanying text.

52. See *Verniero*, 1998 WL 849763, at \*14 (determining that there was no consensus among the experts over what constitutes a "substantial portion"); *Eubanks*, 28 F. Supp. 2d at 1034 (finding it unclear "what might comprise a substantial portion of a fetus"); *Carhart*, 11 F. Supp. 2d at 1129-32 (recognizing that "[i]n any sensible and ordinary reading of the word, a leg or arm is 'substantial'" and that the term "substantial portion" is a vague term, especially when none of the testifying doctors could supply a conclusive definition).

53. See *Carhart*, 11 F. Supp. 2d at 1128 (interpreting Nebraska's ban to include D & E abortions because an arm or leg is routinely delivered into the vagina as a part of performing a D & E and the physician is then required to dismember the fetus outside of the uterus); *Miller*, 1 F. Supp. 2d at 962 (stating that evidence shows that "portions of the fetus may be present in the vagina while others remaining in the uterus still have a heartbeat or other sign of 'life'").

cause occasionally a fragmented living fetus is delivered into the vagina.<sup>54</sup> Furthermore, courts addressing statutes that lacked an explicit intent requirement found that any ambiguity about the statute's scope justified finding the statute unconstitutional.<sup>55</sup>

However, not all courts addressing these general partial-birth abortion statutes have found the language vague and inclusive of D & E procedures. In *Planned Parenthood v. Doyle*,<sup>56</sup> a district court in Wisconsin found that the statute was only ambiguous if one equated "a living child" with "dismembered portions of a living child."<sup>57</sup> The court then concluded that "[d]ismembered body parts are neither a 'child' nor are they 'living' in the ordinary meaning of those words."<sup>58</sup> Moreover, the court found that because the subject of the act was partial-birth abortion, the term necessarily required the delivery of an intact child, not dismembered body parts.<sup>59</sup> However, the Seventh Circuit reversed and granted a preliminary injunction staying enforcement of the statute.<sup>60</sup> The Seventh Circuit

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54. See *Ryan*, 995 F. Supp. at 855 (describing how in a suction curettage abortion a living fetus may be delivered partially into the vagina through a cannula and how in a D & E procedure a physician may partially deliver a living fetus into the vagina); *Evans*, 977 F. Supp. at 1307 (finding the statute ambiguous as to whether it applies only to an intact fetus or also to a fragmented fetus); *Woods*, 982 F. Supp. at 1377 (finding that the unpredictable possibility of the fetus protruding into the vagina while a D & E is performed would cause the statute to include D & E abortions).

55. See *Ryan*, 995 F. Supp. at 857 (stating that inclusion of "knowingly" does not satisfy the intent requirement because a physician is aware of the risk in virtually all abortion procedures that the fetus may protrude into the vagina); *Evans*, 977 F. Supp. at 1308-09 (determining that the lack of an intent requirement combined with the statute's vagueness made the statute unconstitutional).

56. 9 F. Supp. 2d 1033 (W.D. Wis. 1998), *rev'd*, 162 F.3d 463 (7th Cir. 1998).

57. *Id.* at 1041.

58. *Id.* The Wisconsin partial-birth abortion ban statute defined partial-birth abortion as "an abortion in which a person partially vaginally delivers a living child, causes the death of the partially delivered child with the intent to kill the child, and then completes the delivery of the child." WIS. STAT. ANN. § 940.16 (West Supp. 1998).

59. See *Doyle*, 9 F. Supp. 2d at 1041 (citing dictionary definitions of the term "birth" which indicate that the term may "readily appl[y] to the partial delivery of an intact child but hardly appl[ies] to the delivery of dismembered body parts"). But see *Planned Parenthood v. Verniero*, No. CIV. 97-6170 AET, 1998 WL 849763, at \*13 (D.N.J. Dec. 8, 1998) (rejecting the argument that calling the act partial-birth abortion would make it inapplicable to fetal parts).

60. See *Planned Parenthood v. Doyle*, 162 F.3d 463, 471 (7th Cir. 1998).

found that the statute was vague because it was possible for a doctor to be convicted under the statute when a fetus dies in the birth canal as part of a medical induction because the doctor is aware of this potential risk.<sup>61</sup>

Relying upon the analysis of the district court in *Doyle*, the Fourth Circuit ordered a stay of a preliminary injunction against Virginia's partial-birth abortion law.<sup>62</sup> The Fourth Circuit found that the law could apply only to intact deliveries of a living fetus and not mere removal of dismembered body parts of a deceased fetus.<sup>63</sup> In addition, the court found that the delivery of the fetus must be intentional, deliberate, and "for the purpose of performing a procedure" that "will kill the fetus."<sup>64</sup>

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61. See *id.* at 469; see also *infra* notes 69-71 and accompanying text (listing other reasons the Seventh Circuit gave for issuing the preliminary injunction). But see *infra* notes 147-152 and accompanying text (describing induction abortions and explaining why a partial-birth infanticide ban would not encompass medical induction).

62. See *Richmond Med. Ctr. for Women v. Gilmore*, 144 F.3d 326, 331 (4th Cir. 1998) (granting a stay of the preliminary injunction issued by the district court because plaintiffs did not perform D & X procedures and so lacked standing to challenge the statute). The *Gilmore* Court agreed with the reasoning of the *Doyle* court that dismembered body parts could not be equated with intact fetuses. See *id.* at 328-29; *supra* notes 57-58 and accompanying text; *infra* note 63 and accompanying text.

63. See *Gilmore*, 144 F.3d at 328-29. The court listed three reasons why the statute could not be read to include abortion procedures other than the D & X method. First, the statute only prohibited delivery of intact fetuses, not the extraction of dismembered body parts. See *id.* Second, the statute only prohibited delivery of a living fetus, not fetuses killed in the uterus. See *id.* at 329. Third, the statute only prohibited delivery into the vagina, not "through the vagina via an enclosed cannula or similar bypass." *Id.*

64. *Id.* at 329 (quoting VA. CODE ANN. § 18.2-74.2 (Michie 1997)). "[E]ven the intentional and deliberate delivery of a living fetus into the vagina does not violate the statute unless it is performed for the specific purpose of performing a procedure the provider knows will kill the fetus." *Id.* at 328; see also VA. CODE ANN. § 18.2-74.2(D) (defining a partial-birth abortion as "an abortion in which the person performing the abortion deliberately and intentionally delivers a living fetus or substantial portion thereof into the vagina for the purpose of performing a procedure the person knows will kill the fetus, performs the procedure, kills the fetus and completes the delivery"). The court found that a physician performing the suction curettage procedure would fail to satisfy the mens rea requirement because he or she would not be removing an intact fetus intentionally, would not know if the fetus was alive when removed through the cannula, and would not deliver the fetus into the uterus for the purpose of performing an additional procedure to kill the fetus because "the very act of extracting the fetus from the uterus through the cannula is itself the procedure that kills the fetus." *Gilmore*, 144 F.3d at 329; see also *Eubanks v. Stengel*, 28 F. Supp. 2d 1024, 1034 (W.D. Ky. 1998) (reaching the same conclusion about suction curettage procedures). Similarly, the *Gilmore* court found that a physician performing a D & E procedure does not satisfy

Thus, the only abortion method which would be banned by the Virginia law was the D & X procedure, because the ban applied only to delivery of an intact fetus for the purpose of killing it.<sup>65</sup>

Even if partial-birth abortion bans are interpreted to apply only to the D & X method, they must still pass *Casey's* undue burden test to be constitutional as applied to pre-viability abortions.<sup>66</sup> At least one court has found that a partial-birth abortion ban imposes an undue burden on a woman seeking an abortion because all of the alternative procedures carry "an appreciably greater risk of injury or death."<sup>67</sup> Yet, the district court in *Doyle* reached the opposite conclusion, finding that the D & X procedure is no safer than the D & E procedure and that

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the mens rea requirement because the intention is to kill the fetus in the uterus, not in the vagina. See *Gilmore*, 144 F.3d at 330.

65. See *Gilmore*, 144 F.3d at 328-30 (describing how suction curettage and D & E abortions are not included in the ban because neither the actus reus nor the mens rea elements of the statute are satisfied). The court recognized that even if the actus reus portion of the statute was interpreted more broadly than the plain language reading that the court employed, the challenging plaintiff-doctors would still not violate the act without performing a D & X procedure because of the mens rea requirement. See *supra* notes 63-64 and accompanying text (describing the actus reus and mens rea elements of the statute).

66. See *Planned Parenthood v. Casey*, 505 U.S. 833, 878 (1992) (plurality opinion) (requiring that the undue burden analysis be applied to state regulations of pre-viability abortions).

67. *Carhart v. Stenberg*, 11 F. Supp. 2d 1099, 1121 (D. Neb. 1998). In granting the permanent injunction, the court relied upon the earlier findings in the preliminary injunction hearing that D & X procedures are safer than D & E abortions. See *Carhart v. Stenberg*, 972 F. Supp. 507, 525-27 (D. Neb. 1997) (discussing the comparative safety of the D & X procedure and the D & E procedure, induction, hysterectomy or hysterotomy and further recognizing the problems of inducing fetal death by injection prior to the procedure). The district court found the D & X procedure to be safer than the D & E procedure for the following reasons: (1) it reduces instrumentation in the uterus; (2) it reduces potential perforation from bony fragments; (3) it prevents the likelihood of retained fetal parts in the uterus; and (4) it involves "less operative time, which means less risk of hemorrhage, less total bleeding and less risk of infection when the procedure is used." *Id.* Other courts also have found the D & X to be safer than the D & E, but have not proceeded to determine if banning the safer procedure violates *Casey's* undue burden test because their interpretation of the challenged statutes was that both D & E and D & X procedures were banned. See, e.g., *Richmond Med. Ctr. for Women v. Gilmore*, 11 F. Supp. 2d 795, 827 n.40 (E.D. Va. 1998) (concluding that evidence on record showed that "the D & X procedure is often far safer than other D & E procedures"); *Hope Clinic v. Ryan*, 995 F. Supp. 847, 852 (N.D. Ill. 1998) (reciting advantages of the D & X procedure over D & E abortions); *Evans v. Kelley*, 977 F. Supp. 1283, 1296 (E.D. Mich. 1997) (reporting that testimony from doctors showed that the D & X procedures "reduce risks associated with conventional D & Es").



both the AMA and ACOG can identify no situation in which a D & X procedure is the only appropriate abortion option.<sup>68</sup> However, the Seventh Circuit rejected this conclusion and found that even though there are no scientific studies on the comparative safety of the D & X procedure, medical opinion supports the view that the D & X may be the safest procedure.<sup>69</sup> Thus, courts reaching the issue have concluded that a ban of the D & X procedure violates *Casey*'s undue burden test because there is an increased risk of injury or death with other procedures.<sup>70</sup>

Courts also have found unconstitutional partial-birth abortion ban statutes that fail to include an exception for instances in which continuing the pregnancy would constitute a threat to the health of the mother.<sup>71</sup> Other courts have taken this analysis a step further and found that the statutes must provide an exception for mental health risks, as well as physical health risks.<sup>72</sup>

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68. See *Planned Parenthood v. Doyle*, 9 F. Supp. 2d 1033, 1044 (W.D. Wis. 1998) (relying on the views of the AMA and the ACOG that "a ban on intact D & E's leaves women with other appropriate abortion options"), *rev'd*, 162 F.3d 463 (7th Cir. 1998). The court further surmised that since the vast majority of doctors are not performing the D & X procedure, the procedure must not be greatly safer than the D & E procedure. See *id.* at 1045.

69. See *Planned Parenthood v. Doyle*, 162 F.3d 463, 468 (7th Cir. 1998); see also *Planned Parenthood v. Verniero*, No. CIV. 97-6170 AET, 1998 WL 849763, at \*6 (D.N.J. Dec. 8, 1998) (recognizing that there are no valid statistics on the relative safety of the D & X procedure).

70. See *Doyle*, 162 F.3d at 468; *Carhart*, 11 F. Supp. 2d at 1123.

71. See, e.g., *Doyle*, 162 F.3d at 468 (concluding that the lack of an exception for the mother's health makes Wisconsin's partial-birth abortion statute unconstitutional); *Verniero*, 1998 WL 849763, at \*23 (listing health problems associated with pregnancy and concluding that the lack of a health exception makes the statute unconstitutional); *Eubanks v. Stengel*, 28 F. Supp. 2d 1024, 1041 (W.D. Ky. 1998) (stating that the absence of a health exception would seem to violate *Casey*); *Ryan*, 995 F. Supp. at 857 (finding Illinois's partial-birth abortion ban unconstitutional because it failed to provide an exception to the ban when the woman's health is endangered); *Summit Med. Assocs. v. James*, 984 F. Supp. 1401, 1455 (M.D. Ala. 1998) (granting injunctive relief against Alabama's partial-birth abortion because it lacked "any maternal health exception whatsoever"); *Planned Parenthood v. Woods*, 982 F. Supp. 1369, 1378 (D. Ariz. 1997) (finding Arizona's statute unconstitutional because it failed to provide an exception where the partial-birth abortion procedure is necessary for a woman's health). *Casey* requires post-viability abortion regulations to provide an exception for the health, as well as the life, of the mother. 505 U.S. at 879; *supra* note 31.

72. See *Ryan*, 995 F. Supp. at 857 (requiring that an exception to the ban be made for a woman's mental and physical health). In addressing the necessity of a woman's health exception in determining the constitutionality of a

## D. A NEW APPROACH: BANNING PARTIAL-BIRTH INFANTICIDE

By explicitly banning partial-birth procedures as infanticide, proposed Washington Initiative 694 approached partial-birth procedures from quite a different perspective than all prior partial-birth abortion bans.<sup>73</sup> Rather than define partial-birth abortion in procedural terms, Initiative 694 defined partial-birth procedures in terms of the birth process.<sup>74</sup> Specifically, partial-birth infanticide statutes like Initiative 694 would ban the performance of a procedure on a partially-born infant

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ban on post-viability abortions, rather than the ban of the D & X procedure, the Sixth Circuit also found that an exception must be made for both the mental and physical health of the mother. See *Women's Med. Profl Corp. v. Voinovich*, 130 F.3d 187, 209 (6th Cir. 1997), *cert. denied*, 118 S. Ct. 1347 (1998) (surmising that the Supreme Court is likely to hold that a woman must be able to obtain a post-viability abortion "if carrying the fetus to term would cause severe non-temporary mental and emotional harm"). Both of these courts relied upon the definition of "health" supplied by *Doe v. Bolton*, 410 U.S. 179 (1973), the companion case to *Roe v. Wade*. *Doe* stated that physical, emotional, psychological, and familial concerns, as well as the woman's age, are all factors "relevant to the well-being of the patient [and] may relate to health." 410 U.S. at 192. However, in dissenting from the denial of certiorari in *Voinovich*, Chief Justice Rehnquist, Justice Scalia, and Justice Thomas questioned the application of *Doe's* definition of health to post-viability abortions and stated that the constitutionality of a post-viability abortion regulation that lacks a mental health exception has never been addressed by the Supreme Court. See *Voinovich v. Women's Med. Profl Corp.*, 118 S. Ct. 1347, 1349 (1998) (Thomas, J., dissenting from denial of certiorari).

73. Compare *infra* notes 37-39 and accompanying text (describing other states' partial-birth abortion bans), with *infra* notes 74-81 and accompanying text (describing Initiative 694).

74. See Initiative 694 § 2(1) ("Partial-birth infanticide" means the killing of an infant in the process of birth by a person who deliberately and intentionally performs a procedure on the partially born infant that the person knows will terminate the life of the infant and the procedure does terminate the life of the infant."). Although the language of Initiative 694 is unique, other states have made similar arguments when their statutes were challenged. For example, the defendants in *Planned Parenthood v. Woods* argued that a physician performing a partial-birth abortion was committing infanticide. 982 F. Supp. 1369, 1377 (D. Ariz. 1997). However, given the language of the statute, the court rejected the distinction and analyzed the statute as regulating abortion. See *id.* In *Carhart v. Stenberg*, the defendants argued that there is no right to kill a partially-born human being, but the court rejected this argument because there was "no precedent for it." 972 F. Supp. 507, 529 (D. Neb. 1997). The Seventh Circuit also concluded that "there [was] no issue of infanticide" because the state merely was regulating procedures and would have permitted the fetus to be killed by an alternative procedure. See *Planned Parenthood v. Doyle*, 162 F.3d 463, 471 (7th Cir. 1998). Finally, the district court in *Planned Parenthood v. Verniero* rejected the legislature's argument that the statute was not governed by *Roe* or *Casey*. No. CIV. 97-6170 AET, 1998 WL 849763, at \*18 (D.N.J. Dec. 8, 1998).

that is intended to kill the infant and terminates the life of the infant.<sup>75</sup>

As the first proposed partial-birth infanticide ban, Initiative 694 outlined the process of birth as beginning after the occurrence of three steps: (1) dilation, (2) rupture of the amniotic sac (in layman's terms, "the water is broken"), and (3) passage of any part of the fetus into the birth canal.<sup>76</sup> Initiative 694 emphasized that it intended to ban only infanticide, not abortion.<sup>77</sup> It declared that abortion is limited to terminating a pregnancy by killing the fetus inside of the uterus before the process of birth begins, while infanticide refers to the killing of an infant in the process of birth.<sup>78</sup> The Initiative further noted that the Supreme Court has never held that there is a fundamental right to commit infanticide,<sup>79</sup> and proclaimed that as a result, banning infanticide "does not implicate abortion jurisprudence."<sup>80</sup> Finally, Initiative 694 stated that its purpose was "to stop the killing of partially-born infant children and to establish and maintain a clear and impenetrable barrier against partial-birth infanticide."<sup>81</sup>

## II. THE INFANTICIDE BRIDGE

The crux of a partial-birth infanticide ban is its definition of when the birth process begins.<sup>82</sup> By setting forth a three-step formulation of when birth begins and then banning the killing of an infant in the process of birth,<sup>83</sup> statutes like Initiative 694 seek to avoid the vagueness problems of other states'

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75. See Initiative 694 § 2(1).

76. See *id.* § 2(3).

"Process of birth" means the pregnancy has ended and the process of being born has begun, that is, the point in time has occurred when the maternal cervix has become dilated, the protective membrane of the amniotic sac has become ruptured, and any part or member of an infant child has passed from the uterus or womb beyond the plane of the cervical os.

*Id.*

77. See *id.* § 1(8), (11); *infra* Part II.A.

78. See Initiative 694 § 1(7), (8); *infra* Part II.A.2.

79. See *id.* § 1(9) (noting that the Supreme Court "has never held that there is a fundamental or constitutional right to kill a partially born infant, that is, a child in the process of birth").

80. *Id.* § 1(10) (distinguishing abortion as the termination of a pregnancy and not the killing of a partially-born infant).

81. *Id.* § 1(11).

82. See *supra* note 76 and accompanying text.

83. See *supra* note 76 and accompanying text.

statutes.<sup>84</sup> In order to avoid falling into the same arguments as partial-birth abortion bans, the definition of the birth process used by partial-birth infanticide statutes must be medically accurate and not encompass abortion procedures other than partial-birth procedures.

#### A. THE MEDICAL ACCURACY OF INITIATIVE 694'S DEFINITIONS

Medical dictionaries tend to define birth tautologically as "the act of being born."<sup>85</sup> However, turning to the definition of labor, the three criteria for the initiation of the birth process quickly emerge.<sup>86</sup> The criteria for the beginning of the birth process, which would be identified by a partial-birth infanticide statute, parallels the activity that occurs in the first and second stages of labor.<sup>87</sup> For example, Initiative 694 defined the first criterion for the beginning of the birth process as the dilation of the maternal cervix.<sup>88</sup> In the first stage of labor, the cervix is effaced and dilated, creating an opening to the vagina.<sup>89</sup> The edges of the dilated cervix bordering the vagina form the external cervical os, or opening, to the birth canal.<sup>90</sup> When the cervix is fully dilated, the amniotic sac, which is the membrane

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84. See *supra* notes 50-65 and accompanying text (describing the vagueness concerns of courts addressing partial-birth abortion bans).

85. DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 202 (28th ed. 1994) (defining birth "as the act or process of being born"); THOMAS L. STEDMAN, STEDMAN'S MEDICAL DICTIONARY 207 (26th ed. 1995) (defining birth as the "act of being born").

86. See BLACK'S MEDICAL DICTIONARY 322-23 (37th ed. 1992) (defining labor in terms of three stages); STEDMAN, *supra* note 85, at 926-27 (dividing labor into three stages). But see DORLAND'S ILLUSTRATED MEDICAL DICTIONARY, *supra* note 85, at 892 (recognizing a fourth stage of labor as "the hour or two after delivery, when uterine tone is established").

87. See *infra* notes 88-93. The third stage of labor, which consists of the removal of the placenta from the uterus, occurs after the birth process is complete. See DORLAND'S ILLUSTRATED MEDICAL DICTIONARY, *supra* note 85, at 892 (describing the third stage as beginning with expulsion of the infant and ending with complete expulsion of the placenta); STEDMAN, *supra* note 85, at 927 (describing the third stage as removal of the placenta).

88. See *supra* note 76 and accompanying text.

89. See HARRY OXORN, HUMAN LABOR AND BIRTH 117-28 (5th ed. 1986) (describing the effacement and dilation of the cervix); WILLIAMS OBSTETRICS 266 (F. Gary Cunningham et al. eds., 20th ed. 1997) (describing effacement of the cervix as "the 'obliteration' or 'taking up' of the cervix" into the lower uterine segment). The cervix is the neck of the uterus leading to the vagina. See DORLAND'S ILLUSTRATED MEDICAL DICTIONARY, *supra* note 85, at 303; STEDMAN, *supra* note 85, at 314.

90. See DORLAND'S ILLUSTRATED MEDICAL DICTIONARY, *supra* note 85, at 1195; STEDMAN, *supra* note 85, at 1263.

around the fetus,<sup>91</sup> normally ruptures if it has not been broken prior to full dilation of the cervix.<sup>92</sup> Thus, Initiative 694 identified the rupture of the amniotic sac as the second criterion for the beginning of the birth process.<sup>93</sup>

Once the cervix is fully dilated, the second stage of labor begins. The second stage of labor entails the descent of the infant from the uterus to its complete expulsion from the mother.<sup>94</sup> At the end of the second stage of labor the birth process is complete.<sup>95</sup> Because partial-birth infanticide statutes are only seeking to ban the performance of *partial-birth* infanticides, their definition would not follow the birth process to its completion as it is medically defined.<sup>96</sup> Instead, these statutes would define the third criterion for the beginning of the birth process as the passage of any part of the fetus from the uterus to the birth canal.<sup>97</sup>

The second crucial component of partial-birth infanticide statutes is the way in which they define and distinguish the term "abortion." Initiative 694 defined abortion as "the termination of a pregnancy by intentionally killing a living human fetus in the uterus or womb before the process of birth begins."<sup>98</sup> Medical dictionary definitions of abortion encompass

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91. See DORLAND'S ILLUSTRATED MEDICAL DICTIONARY, *supra* note 85, at 60; STEDMAN, *supra* note 85, at 62.

92. See ALFRED BECK, BECK'S OBSTETRICAL PRACTICE 188 (E. Stewart Taylor ed., 9th ed. 1971) (noting that the membrane usually ruptures shortly after the cervix is fully dilated); BLACK'S MEDICAL DICTIONARY, *supra* note 86, at 323 (recognizing that "full dilation of the cervix is usually accompanied by the rupture" of the amniotic sac).

93. See *supra* note 76 and accompanying text.

94. See DORLAND'S ILLUSTRATED MEDICAL DICTIONARY, *supra* note 85, at 892; STEDMAN, *supra* note 85, at 927.

95. See BLACK'S MEDICAL DICTIONARY, *supra* note 86, at 322 (describing the second stage of labor as the expulsion of the child); STEDMAN, *supra* note 85, at 927 (defining the second stage of labor as "expulsive effort, beginning with complete dilation of the cervix and ending with expulsion of the infant").

96. Clearly, the killing of an infant upon the completion of stage two when it is fully outside of the mother would be homicide, which is already outlawed.

97. See *supra* note 76 and accompanying text. But see *supra* notes 52-54 and accompanying text (describing how detached parts of a fetus may pass into the birth canal during an abortion). The language of Initiative 694 could be changed in the enactment of new partial-birth infanticide statutes by defining the third step of the birth process as the passage of any *intact* part of the fetus into the birth canal. See *supra* notes 59-63 and accompanying text; see also *Planned Parenthood v. Verniero*, No. CIV. 97-6170 AET, 1998 WL 849763, at \* 1 (D.N.J. Dec. 8, 1998) (noting that New Jersey's ban failed to require that the fetus be intact when the procedure is performed).

98. Initiative 694 § 1(7).

both natural and induced abortions and do not identify the point at which the fetus is no longer living.<sup>99</sup> However, the term aborticide more narrowly describes the intentional inducement of an abortion and is limited to the killing of an unborn fetus in the uterus.<sup>100</sup> A partial-birth procedure cannot be characterized properly as aborticide because the infant normally is killed when its lower extremities are in the birth canal rather than in the uterus and because the infant is no longer unborn but in the process of being born.<sup>101</sup>

In addition to the fact that induced abortions are limited to the killing of an unborn fetus inside of the uterus, a second component of a partial-birth infanticide ban's definition of abortion further explains why a partial-birth procedure is not an abortion. Partial-birth infanticide bans would define abortion as the termination of pregnancy<sup>102</sup> and establish the parameters of pregnancy as beginning with conception and ending with

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99. See STEDMAN, *supra* note 85, at 4 (defining abortion as "the expulsion from the uterus of an embryo or fetus prior to the stage of viability at about 20 weeks of gestation" with sub-definitions indicating that the term encompasses both spontaneous and induced abortions); DORLAND'S ILLUSTRATED MEDICAL DICTIONARY, *supra* note 85, at 4-5 (defining abortion as the premature expulsion of the products of conception from the uterus with sub-definitions describing both spontaneous and induced abortions). Even legal texts do not identify clearly whether abortion is limited to the termination of fetal life within the uterus. Compare BLACK'S LAW DICTIONARY 7 (5th ed. 1979) (defining abortion as "intentional expulsion or removal of an unborn child from the womb other than for the principal purpose of producing a live birth," which would not necessarily limit abortions to extinguishing fetal life within the uterus), with *id.* at 699 (distinguishing abortion from infanticide because abortion "denote[s] the destruction of the fetus in the womb").

100. See BALLENTINE'S LAW DICTIONARY 4 (3d ed. 1969) (defining aborticide as "the killing of the fetus in the uterus"); BLAKISTON'S GOULD MEDICAL DICTIONARY 4 (4th ed. 1979) (defining aborticide as "the killing of an unborn fetus"); THE LAW DICTIONARY 5 (7th ed. 1997) (defining aborticide as "the killing of the fetus in the uterus"); WEBSTER'S NEW INTERNATIONAL DICTIONARY 5 (3d ed. 1986) (defining aborticide as the "act of destroying a fetus within the uterus").

101. See *supra* notes 20-26 and accompanying text (describing partial-birth procedures).

102. See *supra* note 98 and accompanying text; see also THE DICTIONARY OF MODERN MEDICINE 2 (1992) (defining induced abortion as "the voluntary termination of pregnancy"); BENJAMIN F. MILLER, MILLER-KEANE ENCYCLOPEDIA & DICTIONARY OF MEDICINE, NURSING & ALLIED HEALTH 3 (6th ed. 1997) (defining abortion as the "termination of pregnancy" and induced abortion as "the deliberate interruption of pregnancy"); STEDMAN, *supra* note 85, at 4 (defining criminal abortion as "the termination of pregnancy without legal justification").

the birth process.<sup>103</sup> Both the beginning and ending points of this definition of pregnancy are recognized as medically accurate.<sup>104</sup> A partial-birth procedure cannot be characterized correctly as an abortion because the pregnancy already has ended with the beginning of the birth process.<sup>105</sup> Thus, a partial-birth procedure is not an abortion because the infant is killed when it is at least partially outside of the uterus and also because the pregnancy already has been terminated by the beginning of the birth process.

The final and most critical definitional component of partial-birth infanticide statutes is that they refer to a child in the process of birth as an infant rather than a fetus.<sup>106</sup> Infanticide is recognized medically and legally as the killing of an infant.<sup>107</sup> The medical profession does not appear to endorse the use of either the term fetus or infant for offspring in the process of birth.<sup>108</sup> Medical texts use fetus to describe an unborn child<sup>109</sup>

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103. See Initiative 694 § 1(1) ("Pregnancy begins with conception and ends when the process of birth begins.").

104. See BLAKISTON'S GOULD MEDICAL DICTIONARY, *supra* note 100, at 1092 (defining pregnancy as "the state of a woman . . . from conception to parturition"); STEDMAN, *supra* note 85, at 1420 (defining pregnancy as "the condition of a female after conception until the birth of the baby").

105. The pregnancy has been terminated because once the amniotic sac has been broken, the birth process is irreversible because delay of more than a couple days will lead to infection. See Affidavit of Robert V. Bethel, D.O. ¶ 6, *In re Initiative 694* (Thurston County, Wash., Super. Ct. Apr. 29, 1998) (No. 98-2-01009-3) (stating that once the sac is ruptured there is an increased vulnerability to infection, making birth inevitable); OXORN, *supra* note 89, at 124 (recognizing that the bursting of the amniotic sac is an irreversible factor). But see Declaration of Deborah J. Oyer, M.D. ¶ 5(e), *In re Initiative 694* (Thurston County, Wash., Super. Ct. Apr. 24, 1998) (No. 98-2-01009-3) (stating that the pregnancy does not end until the fetus has completely exited the woman's body); BLACK'S LAW DICTIONARY, *supra* note 99, at 1061 (requiring the child to be delivered before the pregnancy terminates); *supra* note 104 (citing medical dictionary definitions of pregnancy that could be interpreted as requiring a completed birth before the pregnancy is considered over).

106. See Initiative 694 § 1(5).

107. See DORLAND'S ILLUSTRATED MEDICAL DICTIONARY, *supra* note 85, at 836 (defining infanticide as "the taking of the life of an infant"); STEDMAN, *supra* note 85, at 867 (defining infanticide as "the killing of an infant").

108. See MILLER, *supra* note 102, at 888 (using the terms fetus or newborn interchangeably in defining labor); TURNBULL'S OBSTETRICS 574-75 (Geoffrey Chamberlain ed., 2d ed. 1995) (using the term fetus and baby interchangeably in describing labor).

109. See BLACK'S MEDICAL DICTIONARY, *supra* note 86, at 221 (defining fetus as the "unborn child"); DORLAND'S ILLUSTRATED MEDICAL DICTIONARY, *supra* note 85, at 617 (defining fetus as the "unborn offspring").

and infant to describe a child from birth up to age one.<sup>110</sup> Thus, specific nomenclature for a child in the process of birth does not exist in medical literature. Nonetheless, medical dictionaries and obstetrics textbooks more commonly utilize the term infant rather than fetus once the second stage of labor has begun and the child has begun to exit the uterus.<sup>111</sup> Moreover, since a fetus is an unborn child, a child in the process of birth cannot properly retain this description because the birth process is irreversible once the amniotic sac is broken and the child has entered the birth canal.<sup>112</sup> Thus, partial-birth infanticide statutes appropriately assign the title of infant to a child in the process of birth.<sup>113</sup>

## B. INITIATIVE 694'S BAN ON PARTIAL-BIRTH PROCEDURES

Given the above definitions and their medical accuracy, partial-birth infanticide statutes would ban the D & X procedure. A D & X procedure includes the occurrence of each of the three steps that partial-birth infanticide statutes would describe as initiating the birth process.<sup>114</sup> The first step of the D & X method is dilation of the cervix, which is also the first criterion for the beginning of the birth process.<sup>115</sup> Once the cervix

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110. See DORLAND'S ILLUSTRATED MEDICAL DICTIONARY, *supra* note 85, at 836 (defining infant as "a young child . . . from birth to 12 months).

111. See BLACK'S MEDICAL DICTIONARY, *supra* note 86, at 323 (using the term child rather than fetus in describing the stages of labor); DORLAND'S ILLUSTRATED MEDICAL DICTIONARY, *supra* note 85, at 892 (using the term infant in describing the second stage of labor); OXORN, *supra* note 89, at 128 (baby); MILLER, *supra* note 102, at 889 (infant); STEDMAN, *supra* note 85, at 926-27 (infant). But see DANFORTH'S OBSTETRICS AND GYNECOLOGY 115-16 (James R. Scott et al. eds., 7th ed. 1994) (using the term fetus to describe the child throughout the stages of labor); GYNECOLOGY AND OBSTETRICS: A LONGITUDINAL APPROACH 599-601 (Thomas R. Moore et al. eds., 1993) (describing the child as a fetus throughout the second stage of labor); OBSTETRICS: NORMAL AND PROBLEM PREGNANCIES 372-73 (Steven G. Gabbe et al. eds., 3d ed. 1996) (continuing to use the term fetus until the birth process is complete).

112. See *supra* notes 105, 109 and accompanying text. This is true even of a premature fetus, which will be born alive if not killed in the process. See *infra* notes 168-170 and accompanying text. But see BLACK'S LAW DICTIONARY, *supra* note 99, at 699 (stating that infanticide is the killing of an infant soon after birth, which could imply that the birth must be complete before the child is recognized as an infant); STEDMAN, *supra* note 85, at 638 (defining fetus as the "product of conception to the moment of birth," which could be interpreted to use the term fetus to describe the child until the birth is complete).

113. See *supra* note 106 and accompanying text.

114. See *supra* note 76 and accompanying text.

115. See *supra* notes 23, 26 and accompanying text.



is dilated, a doctor performing a D & X procedure will normally seek to manipulate the fetus to the breech position.<sup>116</sup> In order for the fetus to rotate inside of the uterus, the amniotic sac must rupture, which is the second criterion for the beginning of the birth process.<sup>117</sup> After the fetus is in the breech position, the doctor extracts the lower extremities of the fetus from the uterus, passing through the plane of the cervical os into the birth canal of the vagina, which is the third criterion for the beginning of the birth process.<sup>118</sup> Since the birth process has begun and the fetus has partially passed into the birth canal, the fetus is now an infant.<sup>119</sup> The final step of a D & X procedure, in which the brain contents of the infant are evacuated,<sup>120</sup> may properly be described as "[t]he intentional killing of an infant child in the process of birth."<sup>121</sup> Thus, partial-birth infanticide statutes would ban the D & X procedure because it is not an abortion procedure but a form of infanticide.<sup>122</sup>

#### C. INITIATIVE 694'S EXCLUSION OF ABORTION PROCEDURES

Unlike partial-birth abortion statutes, partial-birth infanticide statutes could not be interpreted to ban any abortion procedures.<sup>123</sup> First, in most abortion procedures the three steps necessary for the birth process to begin do not occur.<sup>124</sup> Second, in all abortion procedures the fetus is killed within the uterus rather than during the birth process.<sup>125</sup> Finally, partial-birth infanticide statutes would require the doctor deliberately and intentionally to kill a partially-born infant—the bans would not apply if the doctor intended to kill the fetus in utero.<sup>126</sup>

For each of the above listed reasons, a partial-birth infanticide statute would not prohibit the performance of suction cu-

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116. See *supra* note 24 and accompanying text (describing how a doctor grasps onto a lower extremity of the fetus and pulls it into the vagina).

117. See WILLIAMS OBSTETRICS, *supra* note 89, at 482-85 (describing procedures to rotate a fetus once the amniotic sac is burst).

118. See *supra* notes 24, 95 and accompanying text.

119. See *supra* notes 107-112 and accompanying text (defining the words infanticide and infant).

120. See *supra* notes 4, 25 and accompanying text.

121. Initiative 694 § 1(6).

122. See *supra* note 78 and accompanying text.

123. See *supra* note 53 and accompanying text (noting that courts have drawn a distinction between D & E and D & X procedures).

124. See *supra* note 76 and accompanying text.

125. See *supra* note 78 and accompanying text.

126. See *supra* note 74 and accompanying text.

retage abortions, the most common first trimester abortion procedure.<sup>127</sup> Although suction curettage abortions do include cervical dilation and rupture of the amniotic sac,<sup>128</sup> the third step of the birth process does not occur in a suction curettage abortion because no part of the infant child passes the plane of the external cervical os.<sup>129</sup> A physician performing a suction curettage abortion inserts the suction cannula into the uterine cavity just past the internal cervical os.<sup>130</sup> Thus, no part of the fetus is able to pass from the uterus into the birth canal except through the suction cannula because the cannula is inserted well beyond the plane of the external cervical os.<sup>131</sup> Without fetal passage into the birth canal, the process of birth does not begin and a ban on partial-birth infanticide is never triggered.<sup>132</sup> In addition, during suction curettage abortions, the fetus normally dies prior to removal from the uterus.<sup>133</sup> The fetus normally is not developed enough to withstand the pressure of the suction within the uterus because suction curettage abortions are performed during the first trimester.<sup>134</sup> Therefore, the fetus is dismembered and dies from the suction of the cannula itself.<sup>135</sup> Because it causes the end of the fetal life within the uterus, suction curettage is not a partial-birth infanticide procedure and thus would not be not banned by partial-birth infanticide statutes.<sup>136</sup>

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127. See *supra* note 14.

128. See HERN, *supra* note 15, at 108-17 (describing the steps of a suction curettage abortion as beginning with dilation of the cervix and the passage of amniotic fluid through the cannula followed by often unidentifiable fetal parts).

129. See *supra* note 76 and accompanying text.

130. See HERN, *supra* note 15, at 114.

131. Cf. *supra* note 63 (noting that delivery of the fetus through the vagina in the enclosure of a cannula is not delivery into the vagina).

132. See *supra* notes 76, 97 and accompanying text.

133. See *supra* note 64.

134. See *supra* note 14 (stating that suction curettage abortions are normally performed between the sixth and twelfth week of development).

135. See *Richmond Med. Ctr. for Women v. Gilmore*, 144 F.3d 326, 329 (4th Cir. 1998) (recognizing that "the very act of extracting the fetus from the uterus through the cannula . . . kills the fetus").

136. See *supra* note 78 and accompanying text. In addition, a doctor could not be prosecuted under a partial-birth infanticide statute for performing a suction curettage abortion because he or she would lack the necessary intent to kill a partially-born infant. See *supra* note 126 and accompanying text (explaining that a partial-birth infanticide statute requires deliberate and intentional action as a prerequisite to prosecution); cf. *supra* notes 64-65 and accompanying text (describing why a doctor performing a suction curettage

A partial-birth infanticide ban also would continue to permit the performance of D & E abortions. The first and second criteria for the beginning of the birth process occur in a D & E abortion,<sup>137</sup> but the birth process never begins because no part of the infant passes into the birth canal.<sup>138</sup> Although dismembered parts of a fetus may pass into the birth canal,<sup>139</sup> these cannot be described properly as parts of a partially-born infant child for two reasons. First, dismembered body parts are not a child.<sup>140</sup> Second, a birth does not occur with delivery of dismembered body parts, but upon the expulsion of an intact living being from the uterus.<sup>141</sup> In addition, partial-birth infanticide statutes would not ban D & E abortions because the fetus is killed in the uterus before the process of birth begins.<sup>142</sup> The fetal dismemberment performed within the uterus normally will effectuate the demise of the fetus.<sup>143</sup> However, in some instances the fetus may have a heartbeat for a short period of time.<sup>144</sup> Even though the fetus may continue to live temporarily following dismemberment, the physician does not perform additional procedures to kill the fetus while removing the fetal parts from the uterus because fetal death is already certain.<sup>145</sup> Furthermore, in those rare situations in which the fetus is re-

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abortion would lack the requisite intent to perform a partial-birth abortion).

137. See *Carhart v. Stenberg*, 972 F. Supp. 507, 512-13 (D. Neb. 1997) (describing wider dilation of the cervix and the use of vacuum aspiration or forceps to rupture the amniotic membrane); *HERN*, *supra* note 15, at 137-38 (discussing advantages of rupturing the amniotic membrane before beginning surgical evacuation); *supra* notes 87-94 and accompanying text (describing the first and second criteria of the initiation of the birth process).

138. See *supra* notes 95-97 and accompanying text.

139. See *supra* notes 53-54 and accompanying text (stating that it is possible in a D & E abortion for dismembered parts of a fetus to pass into the birth canal while the fetus is still alive inside of the uterus).

140. See *supra* note 58 and accompanying text.

141. See *supra* note 59 and accompanying text.

142. See *supra* notes 15, 78 and accompanying text.

143. See *Richmond Med. Ctr. for Women v. Gilmore*, 144 F.3d 326, 330 (4th Cir. 1998) (stating that extracting limbs from a fetus will kill the fetus in the uterus).

144. See *Carhart v. Stenberg*, 972 F. Supp. 507, 513 (D. Neb. 1997) (noting testimony from doctors that fetal heartbeat may continue after dismemberment); *supra* note 53 (stating that the fetus may continue to have a heartbeat after dismemberment).

145. See *supra* note 74 and accompanying text (indicating that a person only violates the statute if he performs a procedure on a partially-born infant). In a D & E abortion a doctor would not perform a life-terminating procedure on a partially-born infant because the life-terminating procedure has already been performed in utero.

moved intact from the uterus, the physician will not have performed a procedure to terminate the life of a partially-born infant deliberately or intentionally, because the only intent was to deliver dismembered body parts, not an infant.<sup>146</sup> Therefore, a partial-birth infanticide statute would not prohibit the performance of D & E abortions.

In addition to suction curettage and D & E abortions, induction abortions still could be performed under a partial-birth infanticide statute. While all three steps that are necessary for the process of birth to begin do occur during this procedure,<sup>147</sup> an induction abortion would not violate a partial-birth infanticide statute because the fetus is killed in the uterus by the infusion, not while it is in the process of birth.<sup>148</sup> Even if the fetus is still living when it passes into the birth canal,<sup>149</sup> a doctor performing an induction abortion does not perform any additional procedures on the partially-born infant to terminate its life.<sup>150</sup> Instead, the infant will expire as a result of the prior infusions into the amniotic sac or the fetal oxygen supply being cut off by induced contractions.<sup>151</sup> Finally, a doctor performs an induction abortion with the intent that the fetus will be dead before it passes out of the uterus and thus does nothing deliberately or intentionally to kill a partially-born infant.<sup>152</sup>

Finally, a partial-birth infanticide ban would not apply to abortions performed surgically by hysterotomy or hysterectomy because when those procedures are performed the fetus is not in the process of birth. In a hysterotomy or hysterectomy the

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146. See *supra* note 64 and accompanying text.

147. See HERN, *supra* note 15, at 145 (describing an induction abortion to include natural and induced dilation of the cervix, either deliberate or spontaneous rupture of the membranes, and delivery of the fetus through the birth canal).

148. See *supra* note 17 (describing the drugs used to induce labor and cause fetal demise).

149. See *Hope Clinic v. Ryan*, 995 F. Supp. 847, 852 (N.D. Ill. 1998) (noting that there are rare instances when the fetus is still alive when delivery begins); *Planned Parenthood v. Woods*, 982 F. Supp. 1369, 1377 (D. Ariz. 1997) (indicating that the point in an induction abortion at which fetal death occurs is generally unknown and may occur after the fetus passes through the cervical os).

150. See *supra* note 64 and accompanying text; *infra* note 151 and accompanying text.

151. See *Eubanks v. Stengel*, 28 F. Supp. 2d 1024, 1034 (W.D. Ky. 1998); *supra* notes 17, 148 and accompanying text.

152. See *Eubanks*, 28 F. Supp. 2d at 1034 (finding that "[n]o separate act by the physician is anticipated or required" to kill the fetus in an induction abortion); cf. *supra* note 145.

cervix is not dilated and no part of the fetus passes the plane of the cervical os because the fetus is not removed through the vagina.<sup>153</sup>

### III. DESTINATION—A CONSTITUTIONAL PARTIAL-BIRTH INFANTICIDE BAN

#### A. CONSTITUTIONALLY BANNING PARTIAL-BIRTH INFANTICIDE

Given the accuracy and validity of the above medical definitions and the distinction between abortion and partial-birth infanticide, a statute banning partial-birth infanticide would be constitutional. Such a ban would not infringe on a woman's right to have an abortion because there is no constitutional right to commit infanticide. The Supreme Court has never recognized a right to kill a partially-born infant.<sup>154</sup> In *Roe v. Wade*, the Supreme Court declined to address the unchallenged portion of the Texas statute which outlawed the killing of a child in the state of being born.<sup>155</sup> Thus, *Roe* did not establish a fundamental right to commit partial-birth infanticide.

Moreover, partial-birth infanticide could not be recognized as a new fundamental right.<sup>156</sup> The Supreme Court requires that the "utmost care" be used in recognizing any new due process rights and that restraint be exercised by assuring that any new right be "objectively, 'deeply rooted in this Nation's history and tradition.'"<sup>157</sup> Because infanticide has generally been regarded in the Western World as both wrong and criminal,<sup>158</sup> there would be little basis for formulating a fundamental right to commit partial-birth infanticide under the Court's "deeply rooted" framework.

Given that there is no fundamental right to commit partial-birth infanticide, partial-birth infanticide bans only need be rationally related to a legitimate government interest.<sup>159</sup> Many of the legitimate government interests recognized by the Supreme Court for a ban on physician-assisted suicide in *Wash-*

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153. See *supra* notes 18-19 (describing hysterectomy and hysterotomy as the surgical removal of either the entire uterus or the fetus from the uterus).

154. See *supra* note 79 and accompanying text.

155. See *supra* note 3.

156. See *infra* notes 157-158 and accompanying text.

157. *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (citations omitted).

158. See MICHAEL TOOLEY, ABORTION AND INFANTICIDE 318-19 (1983).

159. See *Glucksberg*, 521 U.S. at 728.

*ington v. Glucksberg* would apply with equal force to partial-birth infanticide bans. In banning both partial-birth procedures and physician-assisted suicide, the government "has an 'unqualified interest in the preservation of human life.'"<sup>160</sup> Similarly, because the performance of both physician-assisted suicide and partial-birth infanticide may lead the public to question the medical profession's ethics and integrity, a state has an interest in preventing this erosion of public faith in the medical community.<sup>161</sup> Finally, while a state may fear physician-assisted suicide starting "it down the path to voluntary and perhaps even involuntary euthanasia,"<sup>162</sup> a state similarly may feel that permitting partial-birth procedures is starting it down the path to legalizing infanticide.<sup>163</sup> Because each of these is a legitimate government interest that is as applicable in the context of partial-birth infanticides as in physician-assisted suicides, a ban on partial-birth infanticides, like a ban on physician-assisted suicides, passes rational basis review and is constitutional.<sup>164</sup>

Alternatively, a state constitutionally could ban partial-birth infanticide under the traditional police powers of the state. Although the Supreme Court in *Roe* stated that the unborn are not persons under the Fourteenth Amendment,<sup>165</sup> the

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160. *Id.* at 728 (citations omitted). "Washington . . . insists that all persons' lives, from beginning to end, regardless of physical or mental condition, are under the full protection of the law." *Id.* at 729. Because a fetus is recognized as living when it has a heartbeat, this beginning of life should also be protected. See *infra* note 170 and accompanying text. But see *Planned Parenthood v. Doyle*, 162 F.3d 463, 470 (7th Cir. 1998) (arguing that a partial-birth procedural ban is not rationally related to a state's interest in the preservation of fetal life because the statute does not "save any fetuses"—it merely requires them to die in utero).

161. See *Glucksberg*, 521 U.S. at 731. This rationale is further supported by the fact that the AMA approved the proposed federal ban on partial-birth abortion. See 143 CONG. REC. S4670 (daily ed. May 19, 1997) (reprinting a letter from the AMA to Senator Santorum in which the AMA states that it supports HR 1122, "The Partial Birth Abortion Ban Act of 1997," as amended because "the procedure [is now] narrowly defined and not medically indicated").

162. *Glucksberg*, 521 U.S. at 732.

163. See *supra* note 81 and accompanying text.

164. See *Glucksberg*, 521 U.S. at 785 (holding that these interests "are unquestionably important and legitimate, and Washington's ban on assisted suicide is at least reasonably related to their promotion and protection"). The same holding could be reached on the constitutionality of a partial-birth infanticide statute.

165. See *Roe v. Wade*, 410 U.S. 113, 158 (1973) (concluding that "the word 'person,' as used in the Fourteenth Amendment, does not include the unborn").

Court did not determine if an infant in the process of being born is a person.<sup>166</sup> A child in the state of being born should be recognized as a person because as long as a partial-birth procedure is not performed, live birth normally will occur. The Court in *Roe* emphasized that life should be viewed as beginning at live birth.<sup>167</sup> It is generally recognized in the medical community that a fetus with a beating heart is alive.<sup>168</sup> Because the heart normally continues to beat throughout the birth process and after complete expulsion from the mother, the child will be born alive if not killed during the birth process.<sup>169</sup> Even if the child is premature and medically nonviable, it is still likely to be born alive with a beating heart and expire only after being unable to breathe on its own.<sup>170</sup> Therefore, the Supreme Court could hold, consistent with *Roe*, that an infant in the process of birth is a person because the child is alive during the birth process and a live birth would have occurred except

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166. See Bopp & Cook, *supra* note 3, at 26 ("A baby who is partially delivered cannot properly be termed *unborn*."); see also *id.* at 28 ("Because the Court chose birth as the magical border one must cross into the land of personhood, any procedure that involves movement over that border is constitutionally significant."). But see *Planned Parenthood v. Verniero*, No. CIV. 97-6170 AET, 1998 WL 849763, at \*18 (D.N.J. Dec. 8, 1998) (responding that the Supreme Court has drawn "the line at viability, not at the uterus").

167. See *Roe*, 410 U.S. at 160-161.

168. See *Hope Clinic v. Ryan*, 995 F. Supp. 847, 854 (N.D. Ill. 1998) (acknowledging that physicians define "living" as "having a heartbeat" but that this definition is inconsistent with dictionary definitions); *Evans v. Kelley*, 977 F. Supp. 1283, 1297 (E.D. Mich. 1997) (stating that there was unanimous agreement among the doctors testifying that "[a] living fetus means a fetus having a heartbeat"). But see *Planned Parenthood v. Woods*, 982 F. Supp. 1369, 1379 (D. Ariz. 1997) (noting that the physicians testifying in that case disagreed on what a living fetus is).

169. See *supra* notes 53-54, 149 (describing how a fetus may continue to live even after a physician performs procedures intended to terminate its life). If a nonviable fetus may continue to live after dismemberment and chemical infusion, it is even more likely to be born alive if no procedures intended to kill it are performed.

170. See *supra* note 168 and accompanying text (stating that the medical community defines living as having a heartbeat). Because a fetal heartbeat is normally recognized by at least eight weeks, a fetus would be considered to be living long before it is viable which is normally recognized as 20 weeks. See MILLER, *supra* note 102, at 3 (stating that "an abortion after 20 weeks is inadvisable for medical and other reasons" and that there are alternatives available); STEDMAN, *supra* note 85, at 1936 (stating that a fetus normally reaches viability at 20 gestational weeks); WILLIAMS OBSTETRICS, *supra* note 89, at 31 (noting that fetal heart action can be detected in a fetus as young as 48 days (seven weeks)).

for the performance of procedures intended to kill the child.<sup>171</sup> Thus, a statute banning partial-birth infanticide could be justified constitutionally under the traditional police powers of the state. Partial-birth infanticide is a form of homicide—an act performed with intent to kill a person in the process of birth.<sup>172</sup>

Admittedly, there is some tension in concluding that partial-birth infanticide bans are entirely constitutional. The majority of lower courts have struck down partial-birth abortion statutes on grounds of vagueness or interference with a woman's right to have an abortion, yet these statutes share the same objective as partial birth infanticide bans.<sup>173</sup> But the tension highlights the fact that the precise language used in the statute is important to constitutional analysis.<sup>174</sup> Indeed, the more carefully drafted language of partial-birth infanticide statutes makes them more likely to serve as a model for those states that have found their partial-birth abortion statutes invalidated.

## B. THE BENEFITS OF THE PARTIAL-BIRTH INFANTICIDE APPROACH

To begin with, the partial-birth infanticide approach to banning partial-birth procedures properly elevates the state's interest in potential life at that point in time when the infant is in the process of being born.<sup>175</sup> One of the *Casey* plurality's main criticisms of *Roe*'s trimester framework was its tendency to undervalue "the State's interest in the potential human life within the woman."<sup>176</sup> *Casey*'s recognition of the state's interest

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171. See *supra* note 169 and accompanying text.

172. See Bopp & Cook, *supra* note 3, at 32. Any proposed partial-birth infanticide ban should assure that the imposed penalty is comparable to homicide penalties. See Initiative 694 § 3 (classifying a violation of the ban as a felony); see also *Planned Parenthood v. Verniero*, No. CIV. 97-6170 AET, 1998 WL 849763, at \*25 (D.N.J. Dec. 8, 1998) (surmising that New Jersey's partial-birth abortion act could not be intended to ban infanticide since it only imposed civil penalties).

173. Compare *supra* notes 37-39 (describing other states' partial-birth abortion bans), with *supra* notes 74-81 (describing Initiative 694).

174. See *Verniero*, 1998 WL 849763, at \*26 n.10 (noting that the legislature could have been more precise in drafting the statute); *Evans v. Kelley*, 977 F. Supp. 1283, 1319 n.38 (E.D. Mich. 1997) (suggesting that a more precisely drafted statute would be upheld); see also *supra* notes 56-65 (recognizing that courts upheld the Wisconsin statute (temporarily) and the Virginia statute because of their more precise language).

175. See *supra* note 160 and accompanying text.

176. *Planned Parenthood v. Casey*, 505 U.S. 833, 875 (1992) (plurality



in fetal life is even stronger in the context of partial-birth procedures because the infant is no longer a potential life but an inevitable life if not killed in the birth process.<sup>177</sup> Moreover, the infant at least is removed partially from the uterus at this stage and on its way to living a separate life independent of the mother.<sup>178</sup>

In addition to highlighting the state's interest in potential human life, classifying partial-birth procedures as infanticide appropriately emphasizes the possible pain felt by the fetus as a part of these procedures. There is consensus in the medical community that from at least the twentieth week onward, the fetal sensory organs throughout the entire body react to touch and relay nervous impulses to the brain, triggering physiological changes in the fetal state.<sup>179</sup> However, there is still debate about whether the mere fact that the fetus reacts to stimuli is an adequate indication of fetal consciousness to pain.<sup>180</sup> Currently, the medical evidence on fetal ability to recognize pain is inconclusive, but a partial-birth infanticide ban would prevent any potential cruelty which an infant killed by partial-birth infanticide would undergo.<sup>181</sup>

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177. See Initiative 694 §1(4); *supra* note 168.

178. See *supra* notes 24, 169 (noting that in the D & X procedure a fetus's lower extremities are out of the uterus and the fetus is on its way to being a living, completely born infant).

179. See *Senate Hearings*, *supra* note 4, at 53 (letter of Watson Bowes, M.D.) (stating that second trimester fetuses normally respond to painful stimuli during in utero procedures); *id.* at 67 (statement of Robert J. White, M.D.) ("By the 20th week of gestation and beyond, the fetus has in place the neuro-circuitry to appreciate pain."); *id.* at 81 (statement of Constance S. Houck, M.D.) (noting that sensory perception begins to develop at 7 weeks and is complete by the 20th week). In fact, some studies have found that a fetus may actually be more susceptible to pain than an adult because the modulators which suppress pain are not fully developed. See *id.* at 67 (statement of Robert J. White, M.D.); Bopp & Cook, *supra* note 3, at 36-37.

180. See *Senate Hearings*, *supra* note 4, at 225 (letter of Norig Ellison, M.D.) (stating that "very little is known about fetal response and consciousness to pain prior to 24-25 weeks gestation," but that delivered infants are "exquisitely sensitive to pain stimulus"); *id.* at 249 (statement of Warren M. Hern, M.D.) (arguing that even though "fetuses have enough neurological development to permit certain reflexes . . . this is not the same as pain").

181. The evidence of fetal ability to feel pain in the second trimester would apply to all abortion procedures, not just partial-birth procedures. See *Planned Parenthood v. Doyle*, 162 F.3d 463, 470 (7th Cir. 1998) (determining that there is no basis for arguing that fetal pain of dying in the birth canal is greater than dying in the womb); *Eubanks v. Stengel*, 28 F. Supp. 2d 1024, 1042 (W.D. Ky. 1998) (suggesting that a D & E would be as painful for a fetus

Another key benefit of the partial-birth infanticide approach is that it avoids the constitutional difficulty under the Supreme Court's jurisprudence regulating abortion.<sup>182</sup> Unlike most court interpretations of partial-birth abortion statutes, a partial-birth infanticide ban would not encompass any abortion procedures.<sup>183</sup> In addition, a partial-birth infanticide ban is likely to be more effective than a partial-birth abortion statute that seeks to directly ban the D & X procedure because it would be more difficult for doctors to circumvent a partial-birth infanticide ban just by varying the normal procedures of the D & X method.<sup>184</sup> Additionally, by not implicating abortion jurisprudence, a partial-birth infanticide ban avoids much of the ongoing uncertainty of applying *Casey's* undue burden test.<sup>185</sup>

Finally, interpreting partial-birth procedures as infanticide rather than abortion makes it easier for a court to find a ban constitutional and grant proper deference to a law enacted by the democratic representatives of the citizenry.<sup>186</sup> Although the judiciary is an equal branch of our tripartite government, courts have only a limited amount of political power. The infanticide approach would allow courts to adhere to the general rule that courts should attempt to construe statutes to avoid constitutional difficulty if such a construction is fairly possible.<sup>187</sup>

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as a partial-birth procedure); *Women's Med. Profl Corp. v. Voinovich*, 911 F. Supp. 1051, 1073 (S.D. Ohio 1995) (finding that testimony at the hearing showed that a D & E abortion may also be painful for a fetus). Thus, opponents of partial-birth procedure bans have argued that the D & X procedure is perhaps more humane than a D & E abortion. See MacLean Massie, *supra* note 13, at 354-55 & 379. However, one important distinction between D & E abortions and partial-birth procedures is that D & E abortions are rarely performed after 20 weeks. Compare *supra* note 15, with *supra* note 22. Because fetal sensory systems have not developed completely until 20 weeks, D & E abortions may be a less painful death. See *supra* note 179 and accompanying text.

182. See *supra* note 80 and accompanying text.

183. Compare *supra* notes 52-57, with *supra* notes 128-153.

184. See *supra* note 29 and accompanying text.

185. See *supra* note 72 and accompanying text (describing some of the uncertainty in applying *Casey's* undue burden test).

186. See *Planned Parenthood v. Doyle*, 9 F. Supp. 2d 1033, 1046 (W.D. Wis. 1998) (holding that a state's "attempt to ban a gruesome and less than humane procedure which physicians occasionally use to kill a child partially born into this world must be accorded the deference it deserves"), *rev'd*, 162 F.3d 463 (7th Cir. 1998).

187. See e.g., *Arizonans for Official English v. Arizona*, 520 U.S. 43, 78 (1997) (stating that it is a cardinal principle of judicial review to construe a statute within constitutional bounds if fairly possible); *Public Citizen v.*

## CONCLUSION

As the first state proposal to ban partial-birth procedures by explicitly characterizing them as a form of infanticide rather than abortion, Initiative 694 forged new ground. Despite the rejection of Initiative 694 by Washington voters, its unique approach is still likely to be utilized by other states that have either found their statutes invalidated or are just enacting partial-birth procedure bans. Admittedly, partial-birth infanticide bans and partial-birth abortion statutes share a common objective of banning procedures that extinguish the lives of partially-born children. Yet, the unique and more precise language of partial-birth infanticide bans makes it more likely that these statutes will be found constitutional because such bans neither infringe upon the right of a woman to choose to have an abortion nor are they unconstitutionally vague.

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United States Dep't of Justice, 491 U.S. 440, 465-467 (1989) (adopting the rule that a statute should be construed to avoid constitutional questions if fairly possible); *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (construing the statute to avoid constitutional difficulty); *NLRB v. Catholic Bishop*, 440 U.S. 490, 507 (1979) (refusing to construe a statute as presenting a constitutional question if a different construction is possible). Few courts addressing partial-birth abortion ban statutes have utilized this canon to guide their interpretation of the language of the statutes. See *Richmond Med. Ctr. for Women v. Gilmore*, 144 F.3d 326, 332 (4th Cir. 1998) (criticizing the district court for not relying on the cardinal principle that state statutes are presumed to be constitutional); *Doyle*, 9 F. Supp. 2d at 1041 (emphasizing that courts should strive to construe a statute to preserve its constitutionality).